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Supreme Court, U.S.
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No. 96-196

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JA-RU,

Petitioner,

- against -

CITY OF NEW YORK,

Respondent.

CITY RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Respectfully submitted

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REPRODUCED ON RECYCLED PAPER

39 pp

COUNTER STATEMENT OF THE QUESTION PRESENTED

Did the New York Court of Appeals correctly rule that § 10-131(g) of the New York City Administrative Code, which, in substance, prohibits sale or possession of toy guns colored black, blue, silver or aluminum, was not preempted by the Federal Toy Gun Law, 15 U.S.C. § 5001, which, inter alia, requires (5001(b)(1)) that a blaze orange plug be placed in the barrel of a toy gun, and in 5001(g) preempts state or local laws or ordinances which "provide for markings or identification inconsistent with" the federal law?

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CITY RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

COUNTER STATEMENT OF THE CASE

Petitioner seeks review of a decision of the New York State Court of Appeals, 88 NY2d 163, dated May 7, 1996, which on an appeal by permission of the Appellate Division, First Department, answered a certified question in2 the affirmative and affirmed the Decision and Order of the Appellate Division, 213 AD2d 210, dated March 14, 1995, which, in turn, affirmed an Order of Supreme Court, New York County (Alice Schlesinger, J.), entered on or about April 12, 1994, which granted the plaintiff, the City of New York (the respondent herein), a preliminary injunction enjoining defendant (petitioner herein) from further violating § 10-131(g) of the Administrative Code of the City of New York (hereinafter, § 10-131).

As relevant here, § 10-131(g), which appears in full at 56a of Petitioner's Appendix, makes it "unlawful for any person to sell or offer for sale, possess or use or attempt to use or give away, any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver, unless said imitation or toy pistol or revolver shall be colored in colors other than black, blue, silver or aluminum." Petitioner contended before the New York State Courts that § 10-131(g) was preempted by subsequent federal legislation, effective April 5, 1989, concerning the manufacture and sale of toy guns, 15 U.S.C. § 5001 (Federal Toy Gun Law) (Petitioner's Appendix 27a-29a), which provides, as mainly relevant here, that "It shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike,

or imitation firearm unless such firearm" has . . . "as an integral part, permanently affixed, a blaze orange plug inserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm." 15 U.S.C. § 001(c)(b)

15 U.S.C. 5001 has an express preemption clause, which states; "The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section", and expressly provides that no state shall prohibit the sale or manufacture of replicas of antique firearms developed prior to 1898 or prohibit the sale (other than to minors) of B-B, paint ball, or pellet-firing air guns.

As directed by the statute, the Department of Commerce promulgated regulations, 15 C.F.R.§ 1150.1-1150.5, which Petitioner provides to this Court in its Appendix (30a-57a), which generally repeat the statutory marking scheme with minor amplifications (§ 1150.3), and which contain a preemption provision, § 1150.5, repeating the statutory provision concerning inconsistent markings or identification (Petitioner's Appendix 55-56a).

Petitioner unsuccessfully urged before all three New York Courts that § 10-131(g) was preempted by the federal statute and regulations, arguing, in substance, that as long as a toy gun contained a blaze orange plug in the barrel no state or local law could prohibit its sale for noncompliance with any additional requirements. The New York State courts correctly rejected this extremely overbroad preemption claim.

Proceedings Before, and Decision of, Supreme Court, New York County

In the motion for a preliminary injunction and complaint the City contended that toy guns which substantially imitated an assault weapon, bearing the petitioner's name on the cardboard advertising back, were being offered for sale in New York City at a Job Lot store, in violation of § 10-131(g). The advertising stated that the object was a "KG-9 MACHINE SOUND PISTOL".... WITH GUNFIRE SOUND REPLICA OF THE KG-9 MACHINE PISTOL."

The City contended that the KG-9 substantially duplicated an actual Tec-9 semi-assault weapon. The toy pistol was entirely black in color, in violation of § 10-131(g) of the Administrative Code, except for one orange piece at the tip. A photograph of the toy pistol with a black tape over the orange colored area was provided to show how easily the orange trim could be completely covered, further enhancing the resemblance of the toy pistol to a real Tec-9 pistol. The imitation pistol also lacked any stamp bearing the name of the manufacturer, trade name or brand, and in that respect also violated § 10-131(g) of the NYC Admin. Code.

The City's submission included photographs of an imitation pistol and an imitation machine gun, a photograph of an actual Tec-9 semi-assault weapon, an operational description of a Uzi pistol and micro-Uzi, with a picture of a Uzi pistol; and the actual toy pistol and machine gun depicted in the photographs. The City also provided the affidavit of Dominic C. Buccigrossi, a New York City Police Sergeant with expertise in ballistics, who stated that

since 1991 the New York City Police Department had confiscated over 2000 toy and imitation guns which had been examined by the Department's Ballistics Squad, with a substantial number of these imitation guns recovered from minors. Sgt. Buccigrossi stated that toy guns were used in the commission of numerous serious crimes, including rape, assault and robbery, that he examined the toy KG-9 pistol at issue and that its design substantially duplicates that of the Tec-9 pistol, which is commonly used in commission of violent crimes, and that he examined a toy Uzi machine sound gun before the IAS Court (sold by another defendant, not petitioners), and in its design it substantially duplicates the Uzi pistol, which is commonly used to commit violent crimes.

By affirmation of its counsel, Frederick B. Locker, JA-RU contended that NYC Admin. Code § 10-131(g) was specifically preempted by 15 USC 5001. Mr. Locker alleged that under the Federal law, if a toy gun contained a permanently affixed blaze orange plug inserted in the barrel it could be marketed lawfully anywhere in the United States, and no State or local ordinance could prohibit its sale. The defendant JA-RU also submitted an answer to the complaint, verified by Mr. Locker as its attorney, which included the preemption claim as an affirmative defense. No affidavit was submitted by any officer or employee of JA-RU, and the record lacked any factual representation by JA-RU with respect to the KG-9 imitation gun purchased by the City attorney at the Job-Lot store.

OPINION OF THE IAS COURT

The Trial Court, State Supreme Court, New York County (IAS Court), rejected JA-RU's contention that

federal law preempted enforcement of NYC Admin. Code § 10-131(g) and that because the JA-RU KG-9 imitation gun had a blaze orange plug in the barrel, as required by 15 USC 5001(b)(1), it could lawfully be sold in New York City (20a-26a). The IAS Court cited to "the assumption 'that the historic police powers of the states are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress' Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)," and further stated that "in light of the strong presumption against preemption of state laws, the courts are obliged to narrowly construe the precise language of federal statutes to determine whether the State or local law is in fact preempted. Cipollone v. Liggett Group, Inc. 112 S.Ct. 2608 (1992)." (23a). According to the IAS Court, State laws were preempted "only when it was persuasively shown 'either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained,'" citing Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (23a).

The IAS Court pointed out that 15 USC 5001(g), which specifically refers to "preemption of state or local laws or ordinances: exceptions," had a limited preemptive scope, providing that the federal statute would supersede only those state or local laws "which provide for markings or identification inconsistent with provisions of this section," and also barring any state law prohibiting sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898 or prohibiting the sale (other than to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure (24a). Furthermore, NYC Admin. Code § 10-131(g), which, like the federal law, sought to

prevent the marketing of toy guns which can be confused with real guns, was not inconsistent with the federal statute, since a manufacturer could comply with both laws (24a-25a).

The IAS Court also held that the issuance of a preliminary injunction was warranted. There was a likelihood that the City would prevail in its enforcement of NYC Admin. Code § 10-131(g) against JA-RU (25a-26a),because "in the absence of an injunction, additional people living and visiting this City will be victimized by individuals using these toy guns to facilitate their commission of violent crimes." (26a). The equities balanced in the plaintiff's favor because a "toy gun manufacturer has a right to seek out the lucrative marketplace of New York City but not at the expense and peril of the innocent people living here". (26a).

DECISION OF THE APPELLATE DIVISION

In a decision of the Appellate Division, First Department, reported at 213 AD2d 210, 623 NYS2d 851, the majority held that enforcement of § 10-131(g) was not preempted by 15 USC § 5001 and federal regulations , 15 CFR part 1150, because the historic police powers of the States were not to be superceded by a Federal Act unless that was the clear and manifest purpose of Congress, the laws were not in conflict and both the federal law and local law could be simultaneously satisfied, 213 AD2d at 210-211, 623 NYS2d 852-853, and the laws complemented each other.

The dissenters, citing to the preemption provision of the federal law, concluded that the Administrative Code

provision was inconsistent with the federal law because conduct which was lawful under the federal statute may be prohibited under local law. According to the dissenters, "[i]t is irrelevant that a manufacturer may be able to comply with the requirements of both Federal and local legislation" (213 AD2d at 213, 623 N.Y.S. 2d at 854) since the local prohibition of conduct permitted by federal law constituted a conflict between the laws and warranted the conclusion that the local law was expressly preempted by the federal law (213 AD2d at 213-214, 623 N.Y.S. 2d at 854).

By Order dated September 26, 1995, the Appellate Division, First Department, granted leave to appeal to the Court of Appeals upon a certified question pursuant to New York Civil Practice Law and Rules (CPLR) § 5713: "Was the order of the Supreme Court, as affirmed by this Court, properly made?" Under the CPLR, §§ 5601, 5602(b)(1), without such permission of the Appellate Division, this non-final order granting a preliminary injunction could not be appealed to Court of Appeals, and the Court of Appeals even lacked jurisdiction to permit the appeal.

DECISION OF THE COURT OF APPEALS

The Court of Appeals unanimously rejected petitioner's claim and affirmed the Decision and Order of the Appellate Division, First Department, City of New York v. Job Lot Pushcart and Ja-Ru, 88 NY2d 163, 643 N.Y.S.2d 944 (decided May 7, 1996). The Court recognized that the challenged law, § 10-131(g), involved the exercise of traditional police powers reserved to the states, and that:

> The United States Supreme Court has decreed that unless Congress manifestly and clearly intends to preempt the States' exercise of jurisdiction over matters relating to the welfare of their citizens, the States' police powers are not to be superseded by a Federal act (*see, Rice v. Santa Fe El. Corp.*,331 US 218, 230; *see also, Fidelity Fed. Sav. & Loan Assn. v. De La Cuesta*, 458 US 141, 152-53; *Auto Workers v. Wisconsin Bd.*, 351 US 266, 274-275 ["States are the natural guardians of the public against violence * * * We would not interpret an act of Congress to leave them powerless to avert * * * emergencies without compelling directions to that effect"]; *Florida Avocado Growers v. Paul*, 373 US 132, 146-47; NY Const, art IX, § 2[c] [ii]. Therefore, the "purpose of Congress is the ultimate touchstone" of preemption analysis (*Retail Clerks v. Schermerhorn,* 375 US 96, 103).
> (88 NY2d at 167, 643 N.Y.S.2d at 946)

The Court stated that the sweep of the Federal Toy Gun Law preemption clause was not as far reaching as petitioner contended, stating:

> Rather, the plain language employed by Congress demonstrates that only State regulation of replicas of antique collector firearms, B-B guns, paint ball guns, or pellet-firing air guns is expressly preempted under 15 USC § 5001(g), which bars any

> State from prohibiting the sale of such devices, and with respect to antique replicas of pre-1898 firearms, the manufacture of such devices (*see*, 15 USC § 5001 [g] [i], [ii]; *Coalition of N.J. Sportsmen v. Florio*, 744 F Supp 602, 608-609).
>
> The clearly defined reach of this provision compels the conclusion that Congress did not intend to supersede all local regulation of markings on toy guns. Where "Congress has considered the issue of preemption and has included * * * a provision explicitly addressing that issue * * * 'there is no need to infer congressional intent to preempt [other] state laws from the substantive provisions' of the legislation. * * * Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted" (*Cipollone v. Liggett Group*, 505 US, at 517, (88 NY2d at 168, 643 N.Y.S.2d at 947).

The Court referred to the legislative history, particularly the comments of the Senate legislative sponsor, Senator Robert Dole, made during the Senate debate that the preemption section had been modified to accommodate a new California law, citing 134 Cong. Rec S.15531, S.15535 (October 11, 1988). These statements indicated that Congress did not intend to impliedly impose a pervasive preemptive federal regulatory scheme precluding any state regulation. Accordingly:

JA-RU's assertion, then, that the essential purpose of the Federal Toy Gun Law is to promote a "uniform system of national regulation": rings hollow. This contention is further undermined when JA-RU's true intention - the unimpeded flow of toy guns through interstate markets - is juxtaposed against the actual goal of the Federal Toy Gun Law - guarding the public safety, which was also the motivating objective for the City Council's adoption of Administrative Code § 10-131(g) in 1955 (*see*, 134 Cong Rec, at S 15534 [statement of Senator Dole that the purpose of his amendment was to "allow continued production, sale and distribution of (toy guns), while at the same time reducing the potential for misuse as much as possible" as "a few incidents have actually occurred to date involving the criminal misuse of toy or imitation guns"]; 134 Cong Rec H 10071 [Oct. 12, 1988] [statement of Representative Moorhead, same as above]; Proceedings of Council of NY City, at 24 [Jan. 18, 1955). However laudable a national public safety campaign regulating the sale and use of realistic toy guns may be, it remains that Congress did not enact the Federal Toy Gun Law to supplant all State and local measures. The issue then narrows to whether the conditions set forth in Administrative Code § 10-131(g) "provides for markings or identification inconsistent with provisions" (15 USC § 5001 [g]) of the

> Federal Toy Gun Law to the extent that there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area" (*Florida Avocado Growers v Paul,* 373 US, at 141, *supra*). (88 NY2d at 169, 643 N.Y.S. 2d at 947, 948)

The Court then determined that there was no conflict between the Federal Toy Gun Law and § 10-131(g) warranting preemption of the latter by the former. It was not impossible to comply with both the local and federal law, citing Florida Avocado Growers v. Paul, supra, 373 U.S. at 142-143, nor did the local law stand as an obstacle to accomplishment of the full purposes and objectives of Congress, citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Barnett Bank v. Nelson, ___ US ___, 116 S.Ct. 1103 (1996). Id. 88 NY2d at 170, 643 N.Y.S.2d at 948. The Court concluded:

> The Federal Toy Gun Law only supersedes State or Local laws that "provide for markings or identification inconsistent with" its terms. The additional conditions imposed by Administrative Code § 10-131(g) do not conflict with the conditions enumerated in the Federal Toy Gun Law. As the Appellate Division noted "it is feasible to make a red or purple toy gun [which bears the manufacturer's trade name and contains] an orange [plug], thus satisfying both laws" (*City of New York v Job-Lot Pushcart*, 213 AD2d, at 210, *supra*). Therefore, it is not impossible to

> comply with both the Federal Toy Gun Law and Administrative Code § 10-131(g). *That* the sale of JA-RU's toy guns is only illegal under the terms of the local provisions is not a basis for preemption of the City law, as the dissenters below opine, because "this general principle applies only where the Legislature has shown its intent to preempt the field" (*Vatore v. Commissioner of Consumer Affairs of City of New York.*, 83 NY2d, at 651, *supra*). Indeed, compliance with both the Federal and local laws at once furthers the intent of Congress and achieves the public safety objective underlying each measure. ....States and localities can erect a regulatory framework that expands upon the Federal foundation, and to the extent that Administrative Code § 10-131(g) complements the Federal Toy Gun Law, the City's regulatory conditions can coexist with the Federal statute.
> (88 NY2d at 171, 643 N.Y.S.2d at 948)

FINALITY

Petitioner simply states that "[t]his Court has jurisdiction pursuant to 28 U.S.C. § 1257" (petition, p. 2), without any discussion of the fact that the Order on appeal involves the legality of a preliminary injunction, a non-final order, reviewed by the New York Court of Appeals only by permission of the Appellate Division, First Department on a certified question. Respondent does not urge this Court to dismiss the petition for certiorari as involving an order

which is not final within the meaning of 28 U.S.C. § 1257; but urges that the petition be denied because the ruling of the New York Court of Appeals is clearly correct and petitioner raises no substantial constitutional question. Nevertheless, the issue of this Court's jurisdiction under 28 U.S.C. § 1257 warrants brief discussion.

As a general rule, a ruling of the highest state Court determining whether a preliminary injunction should be issued is not a final judgment or decree within the meaning of 28 U.S.C. § 1257. Musser v. Sheppard, 299 U.S. 513 (1936). Where the New York State Court of Appeals determined a certified question by an Appellate Division in an appeal requiring permission of the Appellate Division because involving a non-final preliminary injunction order, this Court has held that the determination by the Court of Appeals of a federal constitutional question involved in the appeal does not render the determination by the Court of Appeals a final judgment or decree under 28 U.S.C. § 1257. Williams v. Quill, 303 U.S. 621 (1938) dismissing appeal of such an order of the Court of Appeals, 277 N.Y. 1 (1938); See also American Export Lines v. Alvez, 446 U.S. 274 (1980): Review by the United Supreme Court was sought of a ruling of the New York Court of Appeals on a certified question concerning amendment of a complaint in a maritime case brought in State Court. Resolution of this issue did not involve a final judgment or decree under 28 U.S.C. § 1257. However, by the time certiorari had been granted the State case had been tried and finally determined, and the federal question determined by the New York Court of Appeals was essential to the determination; therefore this Court determined the question.

An exception to the finality requirement of 28

U.S.C § 1257, which requirement limits review by this Court to final judgments and decrees, and therefore avoids piecemeal review of state court decisions, prevents advisory opinions where there may be no real "case" or controversy" in the sense of Article III of the Constitution, and minimizes federal intrusion in state affairs, exists when the challenged state court ruling finally determines a federal question which cannot be preserved for review in further state court proceedings and which is final in such state proceedings. North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973). In the instant situation, the determination of the certified question by the New York Court of Appeals cannot be further challenged in the state court proceedings. In addition, were the petitioner to prevail on other grounds besides its federal challenge to the local law, the preemption issue would evade review by this Court, a factor supporting this Court's review of the ruling of the New York Court of Appeals, See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482, 483 (1975)[1]; Duquesne Light Co. v. Barasch, 488 U.S. 299, 306, 307 (1989).

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[1]Cox, however, involved a First Amendment restraint, a factor not present in this matter, See also Organization For a Better Austin v. Keefe, 402 U.S. 415, 418 (1971): preliminary injunction enjoining picketing was of sufficient duration to have a marked impact on petitioner's First Amendment rights, therefore it was reviewed by this Court; National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 44 (1977): The highest state appellate court denied a stay pending appeal of an injunction restraining a march. The denial of a stay was reviewable because it would deprive petitioners of First Amendment rights during the period of state appellate review.

This Court has also reviewed rulings by the highest state appellate courts on federal preemption claims even though the rulings did not finally conclude the state proceedings. See Belknap Inc. v. Hale, 463 U.S. 491, 492-498 (1983); Local No. 438 Construction and General Laborers' Union AFL-CIO v. Curry, 371 U.S. 542 (1963). In those cases, however, the preemptive federal statute also provided for initial resolution of the issues by a Federal agency with special expertise, such as the National Labor Relations Board, see Belknap Inc. v. Hale, supra, 463 U.S. at 497; Local No. 438 v. Curry, supra, 371 U.S. at 550. In Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 178-180 (1988), State determination of the issues could have seriously eroded federal nuclear production policy, an area of traditional federal preeminence. The instant case, by contrast, involves no issue of adjudicatory supervision by a federal agency, with involvement of the Department of Commerce limited to the passage of regulations, and the conducting of a study in connection therewith. Petitioner even concedes the relevance here of the principle that "In performing the preemption analysis the Court starts with the assumption that the historic police powers of states are not to be superseded by federal acts unless that is the clear and manifest purpose of Congress." (Petition, p. 17).

Although, respondent does not seek dismissal of the writ, petitioner was not warranted in simply disregarding the close question of this Court's jurisdiction under 28 U.S.C. § 1257, which of course is always subject to independent examination and determination by this Court.

REASONS FOR DENYING THE WRIT

This Court recently stated in Medtronic, Inc. v.

Lohr, 116 S. Ct. 2240, 2250 (1996), that in construing the scope of an express preemption provision of a statute the interpretation is informed by two presumptions about the nature of preemption.

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated...in a field which the States have traditionally occupied," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91, L.Ed. 1447 (1947), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*, at 230, 67 S.Ct at 1152; *Hillsborough City.*, 471 U.S., at 715-716, 105 S.St, at 2376; cf. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22, 107 S.Ct. 2211, 2223, 96 L. Ed.2d. 1 (1987). Although dissenting Justices have argued that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the *scope* of its intended invalidation of state law, see *Cipollone*, 505, U.S. at 545-546, 112 S.Ct., at 2632-2633 (SCALIA, J,. concurring in judgment in part, and dissenting in part), we used a "presumption against the pre-emption of

state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. *Id.*, at 518, 523, 112 S.Ct, at 2618, 2621. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.

Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct., 219, 222, 11 L.Ed.2d 179 (1963), that "[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case. See, *e.g.*, *Cipollone*, 505 U.S. at 516, 112 S.Ct., at 2617; *Gade*, 505 U.S. at 96, 112 S.Ct., at 2381-2382; *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed2d 443 (1978). As a result, any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of *congressional purpose*." *Cipollone*, 505 U.S., at 530, n 27, 112, S.Ct., at 2624, n. 27 (opinion of STEVENS, J.). Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. *Gade*, 505 U.S., at 111, 112 S.Ct., at 2390 (KENNEDY, J), concurring in part and concurring in judgment). Also relevant, however, is the "structure and purpose of the statute as a whole," *id.*, at 98, 112

> S.Ct., at 2383 (opinion of O'CONNOR, J.). as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

The Court of Appeals correctly concluded that the preemption provision of 15 USC § 5001(g) did not preempt § 10-131(g). The limited preemptive intent and scope of 15 USC § 5001(g) is apparent from the express language thereof. Given the presumption against federal preemption of State police power regulations, a specific preemption provision in such a federal statute should be narrowly construed; and, absent explicit language in the preemption provision mandating preemption of state and local regulation, claims of express and implied preemption under the federal statute should be rejected. Cipollone, supra, 505 U.S. at 516-518.

The language of the express preemption provision of the federal statute, subd. (g) of 15 USC 5001, renders completely unenforceable state and local laws prohibiting sale or manufacture of nonfiring collector replica of antique firearms, developed prior to 1898 (subsection i), as well as the sale (other than to minors) of traditional B-B, paint ball or pellet-firing air guns (subsection ii), and preempts "State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section." The express language of this limited preemption provision defeats petitioner's claims. The preemption provision in the federal statute clearly and unambiguously expressed the complete preemption of state or local laws prohibiting the

sale or manufacture of antique firearms, and the sale (other than to minors) of B-B paint ball, and pellet-firing air guns, and did not otherwise provide for complete preemption of other regulation. "Obviously, Congress knew how to preempt in this very statute when it wanted to." Motor Vehicle Manufacturers Association v. Abrams, 899 F.2d 1315, 1319 (2d Cir. 1990) *cert. den.* 499 U.S. 912 (1991), where an express preemption provision, narrowly limited to preclude certain state regulatory requirements, indicated a lack of congressional intent to further preempt state enforcement.

The preemption provision of subdivision (g) is not a broad preemption provision of the type construed by the courts as precluding state regulation. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138, 111 S. Ct. 478, 482 (1990); FMC Corp. v. Holliday, 498 U.S. 52, 57-58, 111 S. Ct. 403, 407 (1990); Shaw v. Delta Airlines Inc., 463 U.S. 85, 91 (1983): ERISA preemption provision, 29 U.S.C. § 1144(a), has a broad reach, superseding "any and all State laws as they may now or hereafter relate to any employee benefit plan"; Morales v. Trans World Airlines, 504 U.S. 374, 383-384, 112 S. Ct. 2031, 2036-2037 (1992): broad scope was afforded to the Federal Airline Deregulation Act which had a preemption provision barring states "from enacting or enforcing any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier"; Medtronic Inc. v. Lohr, supra, 116 S.Ct. 2240, interpreting 21 U.S.C. § 360 (k), preempting any requirement "(1) which is different from, or in addition to, any requirement applicable under this chapter to the device and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the

device under this chapter"; Jones v. Rath Packing Co., supra, 430 U.S. at 530-531, interpreting 21 U.S.C. § 678, prohibiting the imposition of "marking labeling, packaging or ingredient requirements in addition to, or different than those made under," the Federal law; Mobil Oil Corp. v. Virginia Gasoline Marketers, 34 F.3d 220, 224 (3d Cir. 1994); *cert. den.* 115 S.Ct. 1097 (1995); interpreting 15 USC § 2806(a) preempting all State laws governing petroleum franchising unless the State law was "the same as" the corresponding federal act provisions; In Defense of Animals v. Cleveland Metroparks Zoo, 785 F.Supp. 100, 102 (N.D. Ohio 1991): involving the preemption provision of the Federal Endangered Species Act, 16 USCA § 1535(f), which explicitly provided for the broad preemptive reach petitioner attributes to the very differently worded subject preemption provision, providing with respect to interstate or foreign commerce in endangered species that "any state law or regulation .... is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter."

The preemption provision at issue provides that the federal law supersedes "any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section." In a preemption statute, the term "inconsistent with" means there is "direct conflict between" the federal and state law "such that compliance with both is a physical impossibility." National Tank Truck Carriers v. City of New York, 677 F.2d 270, 275 (2d Cir. 1982): Federal regulations preempted any requirement of a state or political

subdivision thereof "which is inconsistent with" a federal law and regulations governing transportation of hazardous materials. Although New York City route requirements for such transportation might cause some delay in the transportation of the materials, the City regulations were not inconsistent with the federal law, having the same safety objectives as the federal law. Compliance with both the federal law and the City regulations was not a physical impossibility. Nor were the City regulations an obstacle to accomplishments of any federal statutory purpose. Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1, 5, 6 (2d Cir. 1993) *cert. den.* 114 S. Ct 689 (1994): ERISA provided that with respect to a multiple employer welfare arrangement "any law of any State which regulates insurance may apply ... to the extent not inconsistent with" ERISA provisions, See 29 U.S.C. § 1144 (b) (6). Connecticut laws regulating such a plan were not inconsistent with ERISA because additional costs were imposed on the plan as a result of compliance with State law.

In Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963), a California law, enacted in 1925, prohibited the sale of avocados which did not contain 8% quantities of oil, while avocados grown in Florida qualified for interstate sale under a federal statute enacted in 1937 and a regulatory scheme, developed in 1954, which did not include that oil content requirement. Compliance with the minimum federal standard did not immunize the Florida product from compliance with the additional California standard, enacted to accomplish valid state consumer protection objectives, id. at 144, given the absence of an unambiguous congressional mandate to preclude such additional state regulation. Nor was there irreconcilable

conflict between the federal and state standards, since it was possible to comply with both (The Court gave as an example of an irreconcilable conflict of laws a federal law prohibiting marketing of an avocado with more than 7% oil content and a state regulation prohibiting marketing of an avocado with less than 8% oil content. id. at 143).

As the Court of Appeals, as well as the two lower courts pointed out, it is not impossible to comply with both the Federal Toy Gun Law and § 10-131(g). The Court of Appeals stated, 88 NY2d at 170, 643 NYS2d at 948, as did the Appellate Division, 210 AD2d at 211, "it is feasible to make a red or purple toy gun [which bears the manufacturer's trade name and contains] an orange [plug], thus satisfying both laws."

In New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973), this Court upheld New York State work rules for public assistance recipients against a claim that the rules were preempted by federal statutory work incentive provisions. Although the state work rules were more extensive than, and different from, the federal requirements there was no indication of an express or implied Congressional intent to preclude the additional state regulation and program, which supplemented the federal program and regulations, providing only minimum standards and benefits.

In Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707 (1985), federal regulations concerning plasma collection did not preempt county ordinances and regulations imposing requirements in addition to the federal standards. There was no basis to imply an intent to preclude such local regulation involving

the exercise of a historic state and local police power. Such preemption would not be implied simply because the federal regulations were comprehensive. Id. at 716-719. Both sets of regulations could be enforced without conflict, and both the federal and local laws could coexist without the local regulation constituting an obstacle to the accomplishment and execution of the objectives of the federal regulations.

Where, as here, the Federal and local laws share the same objective -- averting danger posed by toy guns which closely resemble real weapons -- the local regulation does not impede the objective of the federal law, which provided minimum standards which the state or localities could supplement. See Stern v. General Electric Co., 924 F.2d 472, 476 (2d Cir. 1991); Automobile Importers of America v. State of Minnesota, 871 F.2d 717 (8th Cir. 1989) *cert. den.* 493 U.S. 872 (1989); Motor Vehicle Manufacturers Assoc. v. Abrams, supra, 899 F.2d at 1322-1323: minimum federal regulatory requirements for enforcement of warranties did not preclude states from legislating additional requirements as long as compliance with both the federal and state requirements was possible. See also Medical Society v. Cuomo, 976 F.2d 812 (2d Cir. 1991); Pennsylvania Medical Society v. Marconis, 942 F.2d 842 (3rd Cir. 1991); New York State Society of Orthopedic Surgeons v. Gould, 796 F. Supp. 67, 73 (E.D.N.Y. 1992), each rejecting the contention that a federal medicare law which did not ban "balance billing" by participating physicians preempted State law prohibitions of the practice. "The mere fact that federal law permits an act does not necessarily mean that State proscription of it is incompatible with the federal enactment." Id. 796 F. Supp. at 73.

Petitioner's contention is simply that any state or

local regulation which imposes any requirement in addition to the federally mandated orange plug in the barrel of a toy gun is preempted. This construction of the term "inconsistent with" would preclude any state or local regulation which in any way differed from the federal requirements, a clearly overbroad, erroneous construction of the limited preemption provision, 15 U.S.C. 5001(g). In interpreting the term "inconsistent with" in the New York State constitutional Home Rule provision, Article IX, § 2(c), and the New York State Municipal Home Rule Law, § 10(1)(i)(ii), precluding local governments from exercising their police power by adopting laws that are "inconsistent with" the State Constitution or with any general law of the State (which provisions, unlike federal preemption provisions involving police powers, are not subject under New York law to a presumption of restrictive application), the New York Court of Appeals has rejected the contentions that preemption of local law is warranted simply because both state and local laws regulate the same subject matter, or a local law imposes requirements not included in the State legislation, as long as the State laws do not evince an intent to preempt the field. Jancyn Manufacturing Corp. v. Suffolk County, 71 NY2d 91, 97 (1987). Nor is preemption warranted simply because the local law prohibits what the State law permits. Such a "statement of the law is much too broad" because under such a rule all local power to regulate would be illusory. Id., 71 NY2d at 100, citing New York State Club Association v. City of New York, 69 NY2d 211, 221 (1987) affd 487 U.S. 1 (1988); People v. Cook, 34 NY2d 100, 109 (1974); Accord: Incorporated Village of Nyack v. Daytop Village Inc., 78 NY2d 500, 508 (1991). Congress could have easily precluded state and local regulation of toy guns, and clearly did not do so.

The Court of Appeals also correctly concluded that the legislative history of the provision compels the conclusion that Congress did not intend to supersede all local regulation. The Court noted the comments of Senator Dole, that the preemption section was modified to accommodate a new California law, and correctly reasoned that such a modification would not be made if Congress did not intend to permit any state or local regulation in addition to that under the federal law. 88 NY2d at 169, 643 N.Y.S.2d at 447.

The legislators also made other statements, indicating that the federal statute was not meant to preclude any additional state or local regulation. In statements in support of the federal legislation regulating imitation guns, both Senator Dole and Representative Dingell pointed out that the federal laws expressly superseded any state or local law which banned the sale of traditional B-B, paint ball or pellet-firing guns, and then gave an example quite similar to that provided by the IAS Court of the type of state or local law which would be preempted by the federal law in that it required markings inconsistent with federal law, which provides that the imitation gun have a blaze orange plug. "Also, if there were a state law that required a green colored plug or a red stripe on the side, that too would be nullified." 134 Cong Rec. S 29858, October 11, 1988, 134 Cong. Rec. H30081, October 12, 1988.

The primary objective of this legislation was safety. The Federal Toy Gun Law was primarily intended to reduce the hazard presented by toy guns, not to make uniform national standards primarily to facilitate the manufacture and sale of toy guns. The uniform national requirement of an orange plug in the barrel of a toy gun is a minimum

requirement which can be supplemented by state and local safety based regulations. The uniformly required orange plug has the safety purposes of ready visibility and the likelihood of more uniform recognition by the police and others knowledgeable as to the characteristics of toy guns, so that the toys will more readily be distinguished from real weapons. If each state or locality adopted a different marking system, and there was no minimal uniform federal requirement, law enforcement officers and others would not be able to remember all the possible markings denominating toy guns and to readily identify the toys.

The primary safety objective of the statute is evident from the comments of the legislators at the time of its passage. In support of the federal legislation, enacted in 1988, Senator Dole stated that the legislation sought to reduce the potential for "criminal misuse of toy or imitation guns" and the potential for tragedy when children have "some imitation firearms [which] are so realistic as to be absolutely indistinguishable from real firearms." 134 Cong. Rec. S 29857, October 11, 1988. Representative Sharp of Indiana said, in support of the legislation:

> The potential hazards and misuses of an object that resembles a deadly weapon ought to be evident to everyone. A person threatened with such an object can scarcely conduct a detailed examination to determine whether it is in fact real. Similarly, a police officer can hardly be expected to make a detailed inquiry concerning just how real the object in the hands of an adversary is before firing his gun. For these reasons, misuse of toy guns presents a real hazard and a

problem that needs to be addressed.

(134 Cong. Rec. H 30080, October 12, 1988)

Representative Levine of California stated in support of the legislation:

> My interest in the issue of toy guns is a result of some tragic toy gun-related incidents that have occurred in or near my district in Southern California during the past few years. Subsequently, there have been a flurry of toy gun incidents around the country, some of which have resulted in fatalities.
>
> These incidents can be attributed to the proliferation of toy weapons that are alarmingly realistic, and are the same shape and size as real guns. Toys that resemble the type of street weapons that gang members and drug dealers wield are being sold for the use of little children.

(134 Cong. Rec. H 30081, October 12, 1988)

Section 10-131(g) also has a primary safety objective. In sustaining the Administrative Code provision at issue against a claim of preemption by State law, the Court of Appeals, in People v. Judiz, 38 NY2d 529, 532 (1976), cited to the legislative history of the Administrative Code provision to establish its purpose "to prevent the sale, possession or use of models so closely copied from actual weapons as not to be readily discernible as toys." (1

Proceedings of Council of City of NY, p. 24 [1955].)

These two safety based statutes, the Federal Toy Gun Law and § 10-131(g), are not in conflict and can be harmoniously enforced. As the IAS Court stated (25a):

> If New York City precluded toy guns from having any plugs at all or required the plugs to be in a color other than bright orange, that would be inconsistent. In other words a manufacturer could not make his product simultaneously comply with both regulations.
>
> However, making a toy gun, red or purple, or yellow or green and putting a manufacturer's label on it could simultaneously be done by a manufacturer together with the insertion of an orange plug, that is if the manufacturer wanted his products sold in the New York City market. (See for example, in this regard the extended discussion of California's law regulating avocados found in Florida Lime and Avocado Growers, Inc. v. Paul, supra).

This observation was repeated by the appellate courts. As the Appellate Division stated, it is possible to make a toy gun which complies with both laws. "[A] toy gun with a closed barrel and an orange blaze band, made in a color other than those prohibited by the Administrative Code, would also satisfy both laws." 213 AD2d at 211, 623 NYS2d at 852; 564. The Court of Appeals decision makes the same point. 88 NY2d at 170, 643 N.Y.S.2d at

948.

The express language of the federal statute and regulations as well as the statements by the legislators concerning the statute establish that the federal law did not delineate the maximum permissible extent of regulation of toy guns, nor did it provide that there should be no further state or local legislative limitations on the marketing or possession of such objects. The intent to establish limitations on state regulation cannot "be created subtly" over an area involving exercise of the historic police powers of the state. It is assumed that such powers are not superseded by a federal act unless that was the clear and manifest purpose of Congress. Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 500 (1988), citing Hillsborough County v. Automated Medical Laboratories Inc., supra, 471 U.S. 707, 715, Jones v. Rath Packing Co., supra, 430 U.S. 519, 525; Rice v. Santa Fe Elevator Corp, supra, 331 U.S. 218, 230. The Court of Appeals correctly held that the Federal law and regulations did not supersede and nullify the Administrative Code provision § 10-131(g), regulating toy or imitation pistols and revolvers. Petitioner's position is entirely without merit, and the petition should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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New York, N.Y.

Respectfully submitted,

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